

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-1113

ASHLIE BYRD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 7, 2010

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR-2008-1154-2]

HONORABLE DAVID CLINGER,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was convicted of refusing to take a breath test. She argues on appeal that the statute is void for vagueness because it does not clearly state that it is a criminal offense. We affirm.

Appellant was stopped at 4:30 a.m. on January 19, 2008, when a police officer saw the vehicle that she was driving hit the right curb and swerve into the left lane. From her bloodshot eyes, her demeanor, and the strong odor of alcohol emanating from the vehicle, the officer believed that appellant was intoxicated and performed a field sobriety test. Appellant failed the test and was placed under arrest. She refused to take a breath test as requested by the arresting officer, and she executed a document acknowledging that she understood that she was in violation of Ark. Code Ann. § 5-65-205 by virtue of her refusal to submit to a breath test and that her driver's privileges would be revoked pursuant to Ark.

Code Ann. § 5-65-402.

We note that the statute in question, Ark. Code Ann. § 5-65-205, is found in the criminal code. At the time of appellant's arrest, it provided in pertinent part that:

(a) If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-202, no chemical test shall be given, and the person's motor vehicle operator's license shall be seized by the law enforcement officer, and the law enforcement officer shall immediately deliver to the person from whom the motor vehicle operator's license was seized a temporary driving permit, as provided by § 5-65-402.

(b) The Office of Driver Services shall then proceed to suspend or revoke the driving privilege of the arrested person, as provided in § 5-65-402.

Ark. Code Ann. § 5-65-205 (Supp. 2007). Arkansas Code Annotated section 5-65-402(d)(1) (Supp. 2007) provided that “[a]ny decision rendered at an administrative hearing held under this section shall have no effect on any *criminal case* arising from any *violation* of . . . § 5-65-205.” (Emphasis added.) Arkansas Code Annotated section 5-1-108 (Repl. 2006) provides that:

(a) An offense is a violation if the offense is designated a violation by:

(1) The Arkansas Criminal Code; or

(2) A statute not a part of the Arkansas Criminal Code.

(b) Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of the Arkansas Criminal Code if the statute defining the offense provides that no sentence other than a fine, fine or forfeiture, or civil penalty is authorized upon conviction.

Appellant argues that it is unclear whether refusal to take a breath test is a “violation,”

and thus a criminal act, or whether such refusal is merely an administrative matter. We do not address this question because appellant lacks standing to raise the issue. As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. *Reinert v. State*, 348 Ark. 1, 71 S.W.3d 52 (2002). Furthermore, a person challenging the constitutionality of a statute on grounds of vagueness must be one of the "entrapped innocent" who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Id.* Here, the provisions of section 5-65-402(d)(1) and the statement of rights signed by appellant clearly informed her that refusal to submit to the test would be in violation of Ark. Code Ann. § 5-65-205; given that the referenced statutes are part of the Arkansas Criminal Code and that section 5-65-402 expressly speaks in terms of violation of section 5-65-205 being criminal in nature, we cannot say that she was not given fair warning of the criminality of her action.

Affirmed.

HENRY and BAKER, JJ., agree.